Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

—v.—

DONALD M. ISRAEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition asks the Court to settle a major conflict among the courts of appeals by defining the contours of the "abuse of discretion" standard of review. The question presented is as follows:

Whether the magistrate abused his discretion by summarily denying a Rule 60(b) motion even after being presented with substantial evidence that a plaintiff gave sworn testimony in a subsequent proceeding which directly contradicted his prior trial testimony on a pivotal issue?

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 67 Fed. Appx. 56 (2d Cir. 2003) (Petitioner's Appendix ("Pet. App.") at 1a-5a). The order of the court of appeals denying a petition for panel rehearing is found at Pet. App. at 6a. The order of the district court denying petitioner's Rule 60(b) motion is found at Pet. App. at 8a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 13, 2003. (Pet. App. at 1a). The court of appeals denied a timely petition for panel rehearing on September 15, 2003. (Pet. App. at 6a). The jurisdiction of this Court is proper under 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

This petition arises from a hotly contested and bitter business divorce which began with the filing of a breach of contract action by plaintiffs Donald M. Israel ("Israel") and Mark R. Taylor ("Taylor") against their former business partner, defendant-petitioner Daniel E. Carpenter ("Carpenter"), in Massachusetts state court in February 1993.[1]

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[1] Israel is the sole respondent. Taylor assigned all of his rights in the litigation to Israel prior to trial and was listed as an appellee in the court of appeals only because he never formally withdrew as a party.

Over the past decade this dispute has proceeded through state and federal courts in two jurisdictions (including three appeals to the Second Circuit) and has culminated in this third petition for *certiorari*. Notwithstanding the admittedly long and tortuous history of this case, at bottom it is a simple breach of contract action stemming from the acrimonious business divorce between Israel and Carpenter based on the interpretation of one ambiguous section of the contract drafted by Israel's attorneys.

This present aspect of the dispute between the parties began on March 29, 1995, when Israel filed suit against Carpenter in New York state court. The action was timely removed to the United States District Court for the Southern District of New York based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1) and 1441(a). The parties consented to proceed before a magistrate for all purposes pursuant to 28 U.S.C. § 636(c).[2]

In a subsequent suit against Israel by the corporate defendants who prevailed against Israel in this case, Israel signed a sworn affidavit that directly contradicted and undermined his prior trial testimony. Based on that

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[2] Israel had previously dismissed *with prejudice* in Massachusetts the exact same claims subsequently filed against Carpenter in New York. After removal, the magistrate dismissed the action based on *res judicata*. However, on appeal, the Second Circuit (applying Massachusetts law instead of Federal common law) reversed and remanded for trial. *Israel v. Carpenter*, 120 F.3d 361 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998). After a bench trial, in which Carpenter was required to put on his case before Israel rested and the magistrate refused to apply the "missing witness rule," the magistrate ruled in favor of Israel. *Israel v. Carpenter*, 2000 WL 1376255 (S.D.N.Y. Sep. 25, 2000). On appeal, the Second Circuit affirmed in part (liability) and reversed in part (damages). *Israel v. Carpenter*, 9 Fed. Appx. 43 (2nd Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002). On remand, final judgment was entered in favor of Israel. *Israel v. Carpenter*, 2001 WL 1020430 (S.D.N.Y. Sep. 5, 2001).

contradictory statement, Carpenter filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(2) and 60(b)(3) seeking a new trial or, in the alternative, an evidentiary hearing based on Israel's provision of false testimony on a pivotal issue at trial.[3]

The magistrate summarily dismissed Carpenter's Rule 60(b) motion "out-of-hand" by announcing, prior to rendering a decision, that Israel *need not even respond to the motion*.[4] The motion was summarily denied on the very next day in a three-sentence order that contained little factual explanation and no legal analysis. *See* Pet. App. at 8a.

Carpenter timely appealed the denial of his Rule 60(b) motion to the court of appeals. Even after finding that the magistrate "did not specifically address Carpenter's corporate-ownership argument," the court of appeals affirmed the magistrate's denial of the motion on the basis of "find[ing] no abuse of discretion." (Pet. App. at 4a). The court of appeals subsequently denied Carpenter's petition for panel rehearing. (Pet. App. at 6a).

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[3] At trial, Israel testified he believed that shares in the Omega Reinsurance Corporation ("Omega-Re") could *not* be owned by a corporation, thereby supporting his explanation of why he agreed to have the shares, in which he claimed an ownership interest, listed in Carpenter's name. However, in his affidavit in the subsequent action, Israel contradicted himself, stating that he believed the subject shares could, in fact, have been held by a corporation. This was a pivotal issue at trial because the magistrate held: "What is important is the plaintiffs' perception, even if erroneous, that corporate ownership was impermissible since this belief was the basis for their permitting Mr. Carpenter to hold the stock in his own name." *Israel v. Carpenter*, 2000 WL 1376255, *6 (S.D.N.Y. Sep. 25, 2000). The magistrate awarded plaintiffs damages based on their purported interests in the shares.

[4] The day after Carpenter's Rule 60(b) motion was docketed, the magistrate's chambers contacted Israel's counsel advising them that "no response was necessary." (Pet. App. at 10a).

Carpenter seeks reversal of the judgment of the court of appeals that affirmed the magistrate's denial of Carpenter's Rule 60(b) motion and, short of a new trial, seeks a remand to the district court for an evidentiary hearing into Israel's false trial testimony.

REASONS FOR GRANTING THE WRIT

I.

THE MAGISTRATE ABUSED HIS DISCRETION IN DENYING RULE 60(b) RELIEF

Whether analyzed pursuant to Rule 60(b)(2) (newly discovered evidence) or Rule 60(b)(3) (fraud or misrepresentation),[5] Israel's affidavit filed in the subsequent suit (the "Israel Affidavit") (*see* Pet. App. at 11a-14a) provided ample justification for the magistrate to grant the motion. By denying the motion without analyzing the evidence, providing a legal rationale or even requiring a response, the magistrate clearly abused his discretion.

A. Rule 60(b)(2)—Newly Discovered Evidence

It is well-settled that subsequent testimony or factual assertions of a witness which conflict with that witness' trial testimony may constitute "newly discovered evidence" sufficient to justify relief from a judgment so long as it bears on a "pivotal issue" in the case. *See*

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[5] Rule 60(b) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

Gemveto Jewelry Company, Inc. v. Jeff Cooper, Inc., 613 F. Supp. 1052, 1058 (S.D.N.Y. 1985) (relief granted because of new evidence "offered as affirmative and concrete proof of a contrary assertion bearing directly upon a pivotal issue in the case"), *vacated on other grounds*, 800 F.2d 256 (2d Cir. 1986); *Thompson v. County of Franklin*, 180 F.R.D. 216, 224 (N.D.N.Y. 1998) (granting relief because "plaintiff cannot have it both ways").

The Israel Affidavit constitutes "affirmative and concrete proof of a contrary assertion bearing directly upon a pivotal issue in the case," as well as Israel's attempt to "have it both ways."

The magistrate failed to address the principal factual inconsistency in the Israel Affidavit identified by Carpenter: Israel took the position at trial that he believed that Omega-Re stock could not be held in the name of a corporation and then claimed in the Israel Affidavit that he believed a corporation could have been holding the Omega-Re stock. *See* Pet. App. at 13a, ¶ 11. Additionally, it is unclear based on the record how the court of appeals could have properly evaluated whether the magistrate exercised his discretion appropriately. Accordingly, a remand is appropriate for further fact-finding by the magistrate on this pivotal issue.

B. Rule 60(b)(3)—Fraud, Misrepresentation Or Misconduct

Where a witness at trial later gives testimony in another legal proceeding and takes a position contrary to that taken at trial, such misrepresentation justifies relief from judgment pursuant to Rule 60(b)(3). *See Viskase Corp. v. American National Can Co.*, 979 F. Supp. 697 (N.D. Ill. 1997). Moreover, since the goal of Rule 60(b)(3) is to "protect the integrity of litigation in Fed-

eral courts," there is no requirement that the misrepresentation would, if corrected, lead to a different result. *See Lonsdorf v. Seefeldt*, 47 F.3d 893, 898 (7th Cir. 1995) (*cited with approval* in *Zarelli v. New York City Board of Education*, 1999 U.S.App. LEXIS 26507 (2d Cir. Oct. 20, 1999); *DiPirro v. United States*, 189 F.R.D. 60, 66 (W.D.N.Y. 1999); *see also Viskase Corporation*, 979 F. Supp. at 704 ("[t]he last requirement under Rule 60(b)(2) is that the evidence would probably have produced a new result. This requirement, as noted earlier, does *not* exist under Rule 60(b)(3)") (emphasis added) (internal quotations omitted).

The inconsistencies between Israel's trial testimony and his subsequent affidavit clearly comprise the type of misrepresentations warranting relief under Rule 60(b)(3).

II.

THE MAGISTRATE'S FAILURE TO ADDRESS PETITIONER'S *PRIMARY* ARGUMENT RAISES DOUBTS THAT ANY OF THE PIVOTAL EVIDENCE REGARDING RESPONDENT'S FALSE TRIAL TESTIMONY WAS PROPERLY CONSIDERED

The court of appeals stated that it was "not clear from the record whether Carpenter ever specifically explained this argument [*i.e.*, Israel's contradictory testimony regarding the permissibility of corporate ownership of Omega-Re stock] to the District Court, but Carpenter's counsel asserted at oral argument that he did expressly raise the issue." (Pet. App. at 4a). However, not only was this issue raised before the magistrate, it was Carpenter's *primary* argument in support of his Rule 60(b) motion but the magistrate failed to consider it.

Since the magistrate "did not specifically address" Carpenter's corporate-ownership argument (Pet. App. at 5a, n.1.), the court of appeals was forced to speculate as to the specific basis—if any—for the magistrate's decision.

The magistrate's summary three-sentence decision denying Carpenter's Rule 60(b) motion completely ignored Carpenter's primary argument that Israel's trial testimony, when considered in light of his subseque contradictory affidavit regarding his belief about the pe. missibility of corporate ownership of Omega-Re shares, constituted a fraud upon the court warranting Rule 60(b) relief.

Although under normal circumstances the magistrate "was under no obligation specifically to identify and reject each of Carpenter's arguments," *id.*, in this case the magistrate failed to identify and address Carpenter's *primary* (and most compelling) argument. This clear error of judgment is demonstrated by the fact that the magistrate, in his hurry to dispense with Carpenter's motion, ordered Israel not to even bother filing a response. (Pet. App. at 10a).

The hasty and haphazard manner in which Carpenter's motion was handled, coupled with the magistrate's failure to identify and address the primary argument underlying the motion, constitutes an abuse of discretion which militates in favor of vacating the judgment of the court of appeals and the magistrate's ruling.

Such a remedy is particularly appropriate where, as here, the fairness and integrity of litigation in federal courts is at stake because the purpose of the evidentiary hearing would obviously be to inquire whether Israel gave false testimony at trial on a pivotal issue.[6]

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[6] The court of appeals appears to place some importance on Israel's statement in the Israel Affidavit that he believed Carpenter

The unique and disturbing circumstances surrounding the magistrate's consideration (or lack thereof) of Carpenter's motion clearly creates a reason to believe that the magistrate "did not consider all of the evidence presented by Carpenter." (Pet. App. at 5a, n. 1).

This case is very similar to *In re: Cendant Corp. Prides Litigation Welch & Forbes, Inc.*, 234 F.3d 166 (3rd Cir. 2000), where the Third Circuit vacated a district court's denial of a Rule 60(b) motion and remanded for further fact-finding. The Third Circuit held:

> Because the facts before us are incomplete, and because the District Court did not make clear its reasoning and application of the "excusable neglect" factors, we find that we do not have a sufficient basis to review the District Court's ruling for abuse of discretion. We will, therefore, vacate the District Court's decision and remand this case to the District Court with directions to undertake a more thorough determination, with requisite factual findings, of whether the circumstances support [appellant's] claims of "excusable neglect."

Id. at 168.

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had diverted either the Omega-Re stock or "*the cash received for redeeming*" the stock to Voluntary Benefit Systems, Inc. ("VBS"), a company controlled by Carpenter. (Pet. App. at 5a) (emphasis in original). However, Israel's claim that he believed Carpenter may have transferred the cash from the sale of the shares to VBS is belied by the fact that the complaint in this action, while naming VBS in the caption as a defendant, *did not allege any causes of action against VBS* (i.e., for fraudulent conveyance, constructive trust, etc.). *See* Pet. App. at 15a-26a. In other words, it defies credulity that Israel truly believed that Carpenter may have redeemed the Omega-Re shares for cash and then diverted the cash to VBS, yet not have alleged a single cause of action against VBS to recover the cash! The subsequent action involving VBS, in which the Israel Affidavit was filed, was recently dismissed on limitations grounds. *See Voluntary Benefit Systems, Inc. v. Israel*, 2003 U.S. Dist. LEXIS 17738 (S.D.N.Y. Oct. 3, 2003).

The Second Circuit in this case was faced with the *exact* same problem that the Third Circuit faced in *Cendant*. The magistrate's summary denial of Carpenter's Rule 60(b) motion, without addressing Carpenter's primary claim that the underlying judgment was subsequently proven to be based on Israel's false trial testimony, left the Second Circuit with an insufficient factual basis upon which to determine whether the magistrate "act[ed] in the sound exercise of [his] discretion." *Id.* at 172. Consequently, the Second Circuit had no choice but to speculate whether the magistrate had considered all of the evidence. *See* Pet. App. at 5a, n. 1.

The magistrate's three-sentence order (issued within 48 hours of the motion's submission and without full briefing or consideration) denying Carpenter's Rule 60(b) motion fails to address the primary evidence in support of the motion. Consequently, the Second Circuit was unable to determine whether the magistrate properly exercised his discretion in considering the legal principles underlying the motion.

"Notwithstanding our deferential standard of review, it is incumbent upon a district court to make its reasoning and application of the . . . jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion." *Id.* at 173 (internal citations and quotations omitted).[7] *See also Soley v. Star &*

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[7] In light of a recent decision of the Court, it is arguable whether the discretion exercised by a non-Article III magistrate to whom a trial is referred pursuant to 28 U.S.C. § 636(c) is entitled to the same amount of deference accorded to the discretion normally exercised by an Article III district court judge. In *Nguyen v. United States*, ___ U.S. ___, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003), the Court, after analyzing the various distinctions between Article III judges and non-Article III judges, held that a decision issued by a panel of the Ninth Circuit was invalid because the panel included a non-Article III judge.

Herald Co., 390 F.2d 364, 369 (5th Cir. 1968) ("We will not affirm a summary judgment based on the solitary cerebration of the trial court").

The magistrate failed to undertake a sufficient factual analysis or any legal analysis at all. Consequently, as the Third Circuit did in *Cendant*, the Second Circuit should have vacated the order denying the Rule 60(b) motion and remanded to the magistrate "for fact-finding and a thorough, systematic, application of the law to the facts." *Cendant*, 234 F.3d at 173-74.

III.

THE MAGISTRATE'S DECISION WAS BASED ON AN INSUFFICIENT REVIEW OF THE RECORD

The magistrate summarily issued, without seeking any opposition, a three-sentence order denying the Rule 60(b) motion, and did so without a full analysis of the facts or *any* analysis of the law. Consequently, the court of appeals was left with a grossly insufficient record upon which to review the denial for an abuse of discretion.

"Where no adequate basis exists upon which to review the appealed judgment due to insufficient findings of fact and conclusions of law, the judgment should be vacated and the action remanded for further consideration." *Patton v. Secretary of DHHS*, 25 F.3d 1021, 1031 (Fed. Cir. 1994) (vacating and remanding denial of Rule 60(b) relief "because the court's judgment . . . was based on incorrect reasoning and was not otherwise supported by sufficient findings of fact or conclusions of law"). The magistrate's order was nothing but a three-sentence conclusory order supported by faulty analysis of the evidence and no analysis of the law. "[C]onclu-

sory orders . . . generally do not provide this Court with a sufficient basis for review and are therefore disfavored." *Jackson v. Burke*, 256 F.3d 93, 95 (2nd Cir. 2001) (vacating decision based on two-sentence order). *See also Vega-Encarnación v. Babilonia*, 2003 U.S.App. LEXIS 18935, *5 (1st Cir. Sep. 12, 2003) (vacating and remanding based on district court's "brief, one-page order, [because] we are uncertain of the basis for dismissal").

"The district court should make clear its reasoning in applying Rule 60(b) standards in order to allow for appellate scrutiny." 11 Wright, Miller & Kane, *Fed. Practice & Procedure: Civil 2d* (2003 supp.) § 2857 at p. 52 (citing *In re: Cendant Corp. Prides Litigation Welch & Forbes, Inc.*, 234 F.3d 166 (3rd Cir. 2000)). The magistrate failed to do this.

Compounding the problem is that it is unclear what level of scrutiny the magistrate gave to the motion, which was based on Rules 60(b)(2) and 60(b)(3). Although motions under Rule 60(b)(6) require "extraordinary circumstances," *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting) (citing *Klapprott v. United States*, 335 U.S. 601, 613 (1949)); motions under Rules 60(b)(2) and 60(b)(3) are subject to a less demanding—albeit undefined—standard. *See* 11 Wright, Miller & Kane, *Fed. Practice & Procedure: Civil 2d* § 2857 at p. 259.

IV.

A MAJOR CONFLICT EXISTS AMONG THE CIRCUITS IN DEFINING THE "ABUSE OF DISCRETION" STANDARD

While it is absolutely clear that appellate courts review denials of Rule 60(b) motions based on an "abuse of discretion" standard, *see Browder v. Dir., Ill. Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978); what is far from clear is the practical definition of that standard.

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence"). In practice, however, the standard has defied definition. In fact, lower courts use definitions ranging from the objective "reasonableness" test all the way to the highly subjective determination of what is "fundamentally wrong."

While the District of Columbia Circuit uses a fairly simple test, *see Linder v. Dept. of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998) ("An abuse of discretion occurs when the court applies the wrong legal standard or relies on clearly erroneous facts"); the Federal Circuit's test is much more variegated. *See Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1341 (Fed. Cir. 1999) ("An abuse of discretion is found when: (1) the court's decision is clearly unreasonable, arbitrary or fanciful; (2) the decision is based on an erroneous construction of the law; (3) the trial court's factual findings are clearly erroneous; *or* (4) the record contains no evidence upon

which the district court rationally could have based its decision.") (emphasis added).

The First Circuit requires errors which are "meaningful," *see Ruiz-Troche v. Pepsi Cola of Puerto Rico*, 161 F.3d 77, 83 (1st Cir. 1998) ("On abuse-of-discretion review, we will reverse a trial court's decision if we determine that the judge committed a meaningful error in judgment") (internal quotations omitted). Yet the Second, Third and Sixth Circuits require errors which are only "clearly erroneous."[8] *See Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 141 (2nd Cir. 2002) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence") (internal quotations and citations omitted); *LaSalle Nat'l Bank v. First Connecticut Holdings*, 287 F.3d 279, 288 (3rd Cir. 2002) ("An abuse of discretion occurs when the court bases its opinion on a clearly erroneous finding of fact, an erroneous legal conclusion, or an improper application of law to fact"); *Armco, Inc. v. United Steelworkers of America*, 280 F.3d 669, 678 (6th Cir. 2002) ("An abuse of discretion is present when the district court applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact") (internal quotations omitted).

The Fourth, Tenth and Eleventh Circuits require a "clear error of judgment." *See Gannett Co., Inc. v. Clark Construction Group, Inc.*, 286 F.3d 737, 741 (4th Cir. 2002) ("[E]ven if a district court applies the correct legal principles to adequately supported facts, a reviewing court is obliged to reverse if the court below committed a clear error of judgment . . .") (internal quotations and citations omitted); *Vittoria North America v. Euro-Asia*

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[8] Of course, an error can be "clearly erroneous" without being "meaningful."

Imports, 278 F.3d 1076, 1086 (10th Cir. 2001) ("Under the abuse of discretion standard, a trial court's decision will not be disturbed unless we have a definite and firm conviction that the lower court has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances") (internal quotations and citations omitted); *McMahon v. Toto*, 256 F.3d 1120, 1128 (11th Cir.), *reh'g denied*, 275 F.3d 1085 (11th Cir. 2001) ("the abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make"). However, the Fifth Circuit adopts the much less demanding "reasonableness" standard. *See Friends for American Free Enterprise v. Wal-Mart*, 284 F.3d 575, 578 (5th Cir. 2002) ("Generally, an abuse of discretion *only* occurs where no reasonable person could take the view adopted by the trial court") (internal quotations and citations omitted) (emphasis added).

The Eighth Circuit looks for decisions that are "arbitrary and capricious." *See Schatz v. Mutual of Omaha Ins. Co.*, 220 F.3d 944, 946-47 n. 4 (8th Cir. 2000) ("We think review for an 'abuse of discretion' or for being 'arbitrary and capricious' is a distinction without a difference, and we use the terms interchangeably here"). While the Ninth Circuit seems to have combined two diametrically opposed definitions into a single test. *See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) ("Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable or where no reasonable man [or woman] would take the view adopted by the trial court") (internal quotations and citations omitted).

Finally, the Seventh Circuit has adopted a subjective definition unlike that offered by any other court of appeals. *See Johnson v. J.B. Hunt Transport, Inc.*, 280 F.3d 1125, 1131 (7th Cir. 2002) (abuse of discretion "means something more than our belief that we would have acted differently if placed in the circumstances confronting the district judge . . . the district court's decision must strike us as fundamentally wrong") (internal quotations and citations omitted).

Clearly, there is a gross disparity among the courts of appeals regarding the appropriate definition of the "abuse of discretion" standard of review. The Court should grant the petition to clarify the confusion among the circuits.

CONCLUSION

The Court has referred to Rule 60(b) as an "escape hatch." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632 (1962). The magistrate's summary three-sentence order denying the motion, based on faulty evidentiary conclusions and unsupported by any legal analysis, amounts to closing the hatch before the escape can be effected.

Had the Second Circuit given Carpenter the benefit of a prior dismissal *with prejudice* in 1997 or had it adopted the rule outlined in the Third Circuit case of *Cendant, supra,* this petition would not have been filed. However, given that Israel gave false testimony on a pivotal issue of the case and the magistrate refused to investigate, the petition should be granted to avoid a miscarriage of justice.

For the foregoing reasons, it is respectfully requested that the Court grant the petition.

Dated: November 5, 2003

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 02-9225
June 13, 2003

DONALD M. ISRAEL, MARK R. TAYLOR,

Plaintiffs-Appellees,

—v.—

DANIEL E. CARPENTER,

Defendant-Appellant,

BENEFIT CONCEPTS NEW YORK, INC. and
VOLUNTARY BENEFITS SYSTEMS, INC.,

Defendants.

Appeal from a judgment of the United States District Court for the Southern District of New York (James C. Francis IV, Magistrate Judge).

Simon Miller, Greenberg Traurig, LLP, New York, NY, *for Appellant.*

Jay D. Fischer, Fischer Porter Masi & Thomas, New York, NY, *for Appellee.*

PRESENT: MINER, CABRANES *Circuit Judges*, and DRONEY *District Judge*.*

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 13th day of June, two thousand and three.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and hereby is **AFFIRMED.**

---

* The Honorable Christopher F. Droney, of the United States District Court for the District of Connecticut, sitting by designation.

Defendant Daniel E. Carpenter appeals from a final order of the District Court entered September 16, 2002, denying his motion under Fed.R.Civ.P. 60(b) for relief from the District Court's judgment dated September 7, 2001.

The Court's September 7, 2001 judgment was the culmination of a long and tortuous litigation in which the Court found for plaintiffs on their breach of contract claim in this diversity action. *See Israel* v. *Carpenter*, 95 Civ. 2703(DAB)(JCF), 2000 WL 1376255 (S.D.N.Y. Sept. 25, 2000) (judgment for plaintiffs after bench trial), *aff'd in part, vacated in part, Israel v. Benefit Concepts New York, Inc.*, 9 Fed.Appx. 43 (2d Cir. 2001) (unpublished summary order) (vacating and remanding for recalculation of damages), *remanded to, Israel v. Carpenter*, 95 Civ. 2703 (DAB)(JCF), 2001 WL 1020430 (S.D.N.Y. Sept. 5, 2001) (order directing entry of final judgment on remand). Defendant Carpenter seeks relief from the September 7, 2001 judgment on the ground that certain sworn statements made by plaintiff Donald M. Israel in a subsequent malicious prosecution action brought by defendant Voluntary Benefit Systems, Inc. ("VBS") "call into question the integrity of a central factual finding underpinning the Judgment and . . . amount to a fraud committed upon the trial court." Def.'s Br. at 3.

The District Court denied Carpenter's Rule 60(b) motion. *Israel v. Carpenter*, 95 Civ. 2703(DAB)(JCF) (S.D.N.Y. Sept. 16, 2002). The Court stated that "[t]he 'new evidence' on which defendant relies is insufficient to warrant relief," and explained that plaintiff "Israel's statement at trial that he had an 'amicable' business relationship with defendant was qualified by his testimony that they were in the process of a business divorce and so is not directly contradicted by his recent representation that he suspected defendant of diverting jointly owned assets." *Id.*

We believe that the District Court, which was intimately familiar with the facts in this case by virtue of having conducted the bench trial below, made an entirely reasonable determination when it held that Israel's recent testimony regarding his fear that Carpenter was diverting jointly-owned assets was not sufficiently contradictory of his statements at trial to warrant relief. We find no abuse of discretion. *See United States v. Int'l Bhd. of Teamsters,* 247 F.3d 370, 391 (2d Cir.2001) (holding that "[d]enials for relief under Rule 60(b) are reviewed for an abuse of discretion").

Carpenter also argues, however, that the District Court erred by not granting relief based on the fact that Israel stated in the malicious prosecution action that he "believed that VBS was another Carpenter entity to which Carpenter may have diverted the Omega-Re stock or the cash received for redeeming [the] same." Israel Aff. of 7/2/02 11 11. This statement was significant because the District Court's September 7, 2001 judgment was based in part on its finding that "[w]hat is important is the plaintiffs' perception, even if erroneous, that corporate ownership [of Omega-Re stock] was impermissible since this belief was the basis for their permitting Mr. Carpenter to hold the stock in his own name." *Israel v. Carpenter,* 2000 WL 1376255, at *6. Carpenter asserts that the fact that Israel stated in the malicious prosecution action that he feared that Omega-Re stock would be diverted to VBS a corporation directly contradicts Israel's statements at trial to the effect that he did not believe that the stock could be owned by a corporation.

It is not clear from the record whether Carpenter ever specifically explained this argument to the District Court, but Carpenter's counsel asserted at oral argument that he did expressly raise the issue. As part of his Rule 60(b) motion in the District Court, Carpenter submitted:

(1) Israel's affirmation in the malicious prosecution action; (2) a copy of the District Court's opinion and order filed September 25, 2000; and (3) several pages of the trial transcript in this case relating to Israel's subjective belief as to whether corporate ownership of Omega-Re was permissible. In response to the motion, District Court did not specifically address Carpenter's corporate-ownership argument, but stated generally that "[t]he 'new evidence' on which defendant relies is insufficient to warrant relief." *Israel v. Carpenter,* 95 Civ. 2703(DAB)(JCF) (S.D.N.Y. Sept. 16, 2002). As plaintiffs point out, there was a rational basis for the District Court to have found that Israel's sworn statements in the recent malicious prosecution action were not sufficiently at odds with his prior trial testimony to warrant relief. It is entirely possible that Israel could have believed that corporate ownership of Omega-Re stock by VBS was impermissible, and yet feared that Carpenter could have somehow found a mechanism to divert either the stock itself *or "the cash received for redeeming"* the stock to VBS's possession. Israel Aff. of 7/2/02 ¶ 11 (emphasis added). In these circumstances, the District Court's judgment was not an abuse of discretiion.[1]

We have considered all of the appellant's arguments. The judgment of the District Court is hereby **AFFIRMED**.

---

[1] We reject Carpenter's suggestion that his claim with respect to Israel's statements about corporate ownership of Omega-Re stock was never considered below, and that we should therefore review the District Court's judgment *de novo* or vacate and remand regarding that issue. There is no reason to believe that the District Court did not consider all of the evidence presented by Carpenter in his Rule 60(b) before it rendered its judgment. The fact that the District Court did not specifically address Carpenter's argument with respect to Israel's statements on the permissibility of corporate stock ownership is without significance, as the Court was under no obligation specifically to identify and reject each of Carpenter's arguments.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 02-9225
Filed September 15, 2003

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th Day of September, two thousand three.

Present: HON. ROGER J. MINER
HON. JOSE A. CABRANES
Circuit Judges

HON. CHRISTOPHER F. DRONEY
*District Judge**

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs-Appellees,

—v.—

DANIEL E. CARPENTER,

Defendant-Appellant,

---

* The Honorable Christopher F. Droney, of the United States District Court for the District of Connecticut, sitting by designation.

BENEFIT CONCEPTS NEW YORK, INC. and
VOLUNTARY BENEFITS SYSTEMS, INC.,

Defendants.

A petition for panel rehearing having been filed herein by appellant, Daniel E. Carpenter.

Upon consideration by the panel that decided the appeal, it is ORDERED that said petition for rehearing is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: ARTHUR HELLER
Arthur Heller,
Motions Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

95 Civ. 2703 (JCF)
September 16, 2002

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

—v.—

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC. and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Defendant Daniel E. Carpenter, having moved pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure for an order granting him relief from the judgment entered September 7, 2001, it is hereby ORDERED that the motion is denied. The "new evidence" on which defendant relies is insufficient to warrant relief. Mr. Israel's statement at trial that he had an "amicable" business relationship with defendant was qualified by his testimony that they were in the process of a business divorce

and so is not directly contradicted by his recent representation that he suspected defendant of diverting jointly-owned assets.

SO ORDERED

JAMES C. FRANCIS IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
September 12, 2002

[LETTERHEAD OF FISCHER PORTER CALIGUIRE & THOMAS, P.C.]

September 11, 2002

VIA: FIRST CLASS MAIL
Honorable James C. Francis, IV
United States Magistrate Judge
United States District Court, Southern District of New York
500 Pearl Street, Room 1960
New York, NY 10007

RE: Israel v. Carpenter,
Case No. 95 CIV 2703 (DAB)(JCF)

Your Honor:

I write to confirm the conversation I had earlier today with Derit Wingley of your Chambers, wherein she advised me that no response was necessary to the motion papers filed on September 6, 2002 on behalf of Mr. Carpenter in this matter. We understand your Honor will be issuing an Order.

I thank your Honor for your time and consideration of this matter.

Respectfully,

/S/ EDWARD N. MAZLIS
Edward N. Mazlis

ENM: tm

cc: Simon Miller, Esq.
Alan C. Thomas, Esq.
Arthur L. Porter, Jr., Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No.: 01 CV 8518 (MBM)

VOLUNTARY BENEFIT SYSTEMS, INC.,

Plaintiff,

—v.—

DONALD M. ISRAEL and MARK R. TAYLOR,

Defendants.

AFFIDAVIT OF DONALD M. ISRAEL IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DONALD M. ISRAEL, an individual whose principal place of business is 19 West 44th Street, Suite 416, New York, NY 10036, being of full age, upon his oath deposes and says:

1. I am a Defendant in this matter and was one of the plaintiffs in a prior lawsuit entitled *Donald M. Israel, et al v. Daniel Carpenter, Benefit concepts New York, Inc., and Voluntary Benefits Systems, Inc.*, bearing Case Number 95/107807 (hereinafter "the underlying action").

2. I make this affidavit in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs Motion for Summary Judgment.

3. My business relationship with Daniel Carpenter ("Carpenter") and Mark Taylor ("Taylor") began sometime in late 1983 or early 1984 through a corporation called Benefit Concepts, Inc., which later changed its name to Benefits Concepts New York, Inc., ("BCNY"). The business venture involved the sale of life insurance and qualified retirement plans.

4. By 1991, my and Taylor's business relationship with Carpenter had soured due to a lack of trust. Among other things, I felt that Carpenter was attempting to divert BCI's corporate assets and rights for his own benefit or for the benefit of companies he owned or controlled, such as VBS. Indeed, on August 1, 1991, I received a letter from CONFED. The CONFED letter served as further evidence that VBS was another Carpenter entity through which Carpenter was diverting funds. *See* Exhibit "C".

5. Recognizing that it would be impossible to continue my business relationship with Mr. Carpenter, a business "divorce" was negotiated AND consummated with an agreement dated September 3, 1991 ("The Buyout Agreement"). The Buyout Agreement provided for the sale of my equity interests in BCNY to Daniel Carpenter. *See* Exhibit "A".

6. The Buyout Agreement further provided for the disposition of my equity interests In Omega Reinsurance Company ("Omega-Re") which interests were held in BCNY by Carpenter.

8. Notwithstanding the plain language of the Buyout Agreement, whereby our share of BCNY's ownership interests in Omega-Re were to be held by Carpenter on

our behalf, Mr. Carpenter refused to execute the documents necessary for Taylor and me to receive our stock and/or cash when the stock was redeemed by Omega-Re.

8. Sometime in early 1993 and late 1994, prior to the commencement of the underlying action, Carpenter commenced two (2) lawsuits against me and Taylor alleging that he was entitled to receive the CONFED commissions in the amount of approximately $163,000.00. Carpenter claimed that Carpenter BCNY and/or Carpenter/ Voluntary Benefits Systems, Inc., (VBO) had allegedly sold the policies that earned these commissions. *See* Exhibit "B".

9. The reason why I state "Carpenter/BCNY and/or Carpenter/VBS" is because two (2) different lawsuits were commenced in two (2) different jurisdictions (Massachusetts and New York), one naming VBS as plaintiff, the other naming BCNY as ptalntiif. Both lawsuits allege that the CONFED payment of approximately $163,000.000 was due and owing to that particular entity.

10. On the face of these two (2) lawsuits, the question arose whether VBS was an alter ego of BCNY and whether VBS and BCNY were alter egos of Carpenter since both VBS and BCNY were wholly owned and controlled by Carpenter and both entities wane claiming rights to the same CONFED payment.

11. Consequently, in 1995, when BCNY was named in the underlying action (which was successful on the merits against Carpenter), VBS was also named because I believed that VBS was another Carpenter entity to which Carpenter may have diverted the Omega-Re stock or the cash received for redeeming same.

12. My suspicions regarding the diversion of funds is confirmed by the findings of their Examiners Report

dated November 5, 1996 In the VBS Bankruptcy. The *Examiner found several "unexplained transfers" of funds between VBS and BCNY. See* Affirmation of Stuart Meyer, Esq. Exh. "B" at 5-10 through 5-14.

13. On or about September 25, 2000, a judgment In the underlying action was rendered by Judge Francis in my favor against Daniel Carpenter in the sum of $402,518.95. A judgment was also entered in favor of Mark Taylor in the amount of $181,575.21. After Carpenters appeal, the total amount of the judgment was reduced to $491.839.26.

14. In light of my previous dealings with Carpenter and the two (2) lawsuits filed prior to the commencement of the underlying action, my attorneys advised me that it is readily demonstrable that plaintiffs In the underlying action had probable cause to include VBS as a defendant in the underlying action.

DONALD M. ISRAEL
DONALD M. ISRAEL

Sworn to before me this 22nd
day of July, 2002

Teresa Chan
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 95/107807

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

—v.—

DANIEL CARPENTER, BENEFIT CONCEPTS NEW YORK, INC. and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

COMPLAINT

Plaintiffs, Donald M. Israel and Mark R. Taylor, as and for their Complaint, allege as follows:

GENERAL ALLEGATIONS

1. At all relevant times herein mentioned, Plaintiff Donald M. Israel ("Israel") was and is a resident of the State of New York and was an officer and employee of Benefit Concepts New York, Inc. ("BCNY").

2. At all relevant times herein mentioned, Plaintiff Mark R. Taylor ("Taylor") was an officer and employee of BCNY.

3. At all relevant times herein mentioned, Defendant Daniel Carpenter ("Carpenter") did and is doing business in the State of New York, maintaining offices at 101 Park Avenue, 26th. Floor, New York, New York.

4. At all relevant times herein mentioned, Carpenter was and is an officer, director, shareholder, employee and/or agent of Defendant Benefit Concepts New York, Inc. and Defendant Voluntary Benefit Systems, Inc. ("VBS").

5. Defendant BCNY is a New York corporation with its principal place of business located in the State, City and County of New York.

6. Beginning in or about 1985, Plaintiffs Israel and Taylor and Defendant Carpenter conducted an insurance and employee benefit plans business under the name Benefit Concepts, Inc., which was subsequently changed by amendment to BCNY.

7. Defendant Voluntary Benefit Systems, Inc. ("VBS") is a Delaware corporation incorporated in or about January 1991 by Defendant Carpenter.

8. Upon information and belief, New England Mutual Life Insurance Company ("New England") is a mutual insurance company with its principal place of business in the City of Boston, Commonwealth of Massachusetts, and duly authorized and licensed to conduct a life, accident and sickness insurance business in such state.

9. Upon information and belief, Omega Reinsurance Corporation ("Omega") is a corporation incorporated under the laws of the State of Arizona.

10. Upon information and belief, National Financial Marketing Group Inc. ("National Financial") is a foreign corporation.

11. Since on or after January 1, 1984, Israel and Taylor (collectively the "Plaintiffs") and Carpenter were duly appointed insurance agents of New England.

12. On or about January 1, 1986, New England incorporated or caused to be incorporated Omega and National Financial as a way of providing additional compensation and other benefits to its appointed insurance agents.

13. On or about January 1, 1986, New England adopted a program (the "Program") whereby New England permitted certain eligible appointed agents (the "Principals") to write life and other insurance business with New England and provided marketing support services to such agents through National Financial. New England would in turn reinsure some or all of such insurance business with Omega.

14. Omega has issued two classes of stock, voting stock (the "Voting Stock") and participating or equity stock (the "Participating Stock") and National Marketing is authorized to issue one class of stock (the "NFMG Stock").

15. Upon information and belief, the Principals own of record 100% of the Omega Voting Stock, the Participating Stock and the NFMG Stock").

16. Upon information and belief, under the Program, New England required that only an individual could become Principal and that two or more individuals could not become co-Principals or Joint Principals.

17. Upon information and belief, under the Program, New England permitted each individual Principal to designate one or more unit members ("Unit Members").

18. In 1985, Israel, Taylor and Carpenter conducted an insurance agency business under the name "Benefit Concepts, Inc.", which was subsequently changed to "Benefit Concepts New York, Inc." (collectively "BCNY").

19. Israel, Taylor and Carpenter were shareholders, directors and officers of BCNY, a New York corporation.

20. Defendants/counterclaimants and Carpenter agreed in or about 1985 that Carpenter would, individually, on behalf of defendants/counterclaimants and Carpenter, become the Principal of Omega and NFMG and defendants/counterclaimants would become Unit Members thereof.

21. In or about 1985 through 1991, Israel, Taylor and Carpenter, individually and collectively, placed insurance business with New England which was reinsured by New England with Omega.

22. On or about September 3, 1991, Israel, Taylor and Carpenter, BCNY and certain affiliated corporations, entered into a so-called termination agreement pursuant to which, *inter alia*", Carpenter, Israel and Taylor separated and their business interests were divided amongst them (the "Buy-Out Agreement").

23. The Buy-Out Agreement was entered into in the State, City and County of New York.

24. Pursuant to Paragraph 11(a) of the Termination Agreement, Israel, Taylor and Carpenter acknowledged and agreed that BCNY's interest in Omega and National Financial was held of record in the individual name of Carpenter and was held by Carpenter on behalf of Israel, Taylor and Carpenter.

25. Pursuant to Paragraph 11(c) of the Termination Agreement, in the event that Israel and Taylor elected to

directly participate (jointly or individually) in Omega and/or in National Financial (rather than through Carpenter), Carpenter agreed to execute any and all assignments and/or other documents necessary for third-party plaintiffs to individually commence participation in Omega and/or in National Financial with the transfer of third-party plaintiffs' interest in Omega to new stock issued to Israel and to be equitably owned by Israel and Taylor according to their allocated interest.

26. On or about December 22, 1992, Israel and Taylor demanded that Carpenter perform his obligations under Paragraph 11 of the Buy-Out Agreement, which Carpenter has refused to do.

27. On or about November 19, 1992, New England, Omega and National Financial announced to all Principals and Unit Members of Omega and National Financial that in early 1993 New England would make an offer to purchase approximately 100% of the Omega Voting Stock of each Principal for $50,000 (the "Voting Stock Payment") and would subsequently pay a portion (i.e. 40% of the Participating Stock accounts of the Principals and their Unit Members (the "Participating Stock Payment").

28. Three distributions of the Carpenter Unit's equity in Omega have been made and paid to Carpenter as follows:

(a) $50,000.00 on or about December 12, 1993;

(b) $453,411.00 on or about December 23, 1993; and

(c) $111,221.71 on or about November 11, 1994.

29. The aforementioned distributions were drawn from and reduced pro rata the individual equity balances of Carpenter, Taylor and Israel.

30. In or about November 1994, Carpenter voluntarily terminated or was involuntarily terminated as a Unit Member of Omega.

AS AND FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

31. Third-Party Plaintiffs Israel and Taylor repeat, reiterate and realleged each and every allegation set forth in Paragraphs 1 through 30 herein with the same force and effect as though fully set forth at length herein.

32. Carpenter's failure to perform his obligations under Paragraph 11 of the Buy-Out Agreement was a material breach of such Agreement.

33. As a result of such breach, Third-Party Plaintiffs have been damaged in an amount of not less than $320,000.00.

AS FOR A SECOND CAUSE OF ACTION
(Specific Performance)

34. Third-Party Plaintiffs Israel and Taylor repeat, reiterate and reallege each and every allegation set Paragraphs 1 through 33 herein with the same force and effect as through fully set forth at length herein.

35. Carpenter has materially breached the terms of Paragraph 11 of the Buy-Out Agreement.

36. As a result of such breach, money damages which would be payable to Israel and Taylor would be inadequate because under the Buy-Out Agreement, Plaintiffs are entitled to elect to participate directly as a Unit of

Omega and thus become Omega shareholders in their own right and to have transferred to them their accumulated equity interest held by Defendant Carpenter on behalf of and for the benefit of Israel and Taylor. Such entitlement is unique and special, and money damages would be an inadequate remedy at law and inadequate compensation for Carpenter's breach of the Buy-Qut Agreement.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

37. Plaintiffs Israel and Taylor repeat, reiterate and reallege each and every allegation set forth in Paragraphs 1 through 36 herein with the same force and effect as though fully set forth at length herein.

38. Plaintiffs Israel and Taylor request a declaratory ruling from the Court that:

(a) Carpenter breached his obligations under Paragraph 11 of the Termination Agreement;

(b) Carpenter is required to execute any and all assignments and/or other documents, and to do such acts, necessary to effectuate the transfer of Plaintiffs Israel and Taylor's equity interest in Omega stock as reflected in Carpenter's individual record ownership of Omega Voting and Participating Stock to new stock to be issued to both Israel and Taylor either collectively or individually, and to be equitably owned by Israel and Taylor according to their allocated interests;

(c) Israel and Taylor are entitled to own of record a portion of the Voting Stock and to receive a portion of the Voting Stock Payment, to be made by New England,

for the BCNY Voting Stock held of record by Carpenter, in an amount to be determined at trial;

(d) Israel and Taylor are entitled to own of record a portion of the BCNY Stock held of record by Carpenter and to receive a portion of any distribution made thereon, in an amount to be determined at trial; and

AS AND FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)
(Paragraph 2 of Termination Agreement/ Specific Performance)

39. Plaintiffs Israel and Taylor repeat, reiterate and reallege each and every allegation set forth in Paragraphs 1 through 38 herein with the same force and effect as though fully set forth at length herein.

40. Pursuant to Paragraph 2 of the Termination Agreement and Schedule "B" thereto, Carpenter agreed that Israel and Taylor were entitled to 40% of all compensation payable on the E. Gluck case. Further, Carpenter agreed to take all action necessary for Israel and Taylor to receive such compensation directly from New England.

41. Upon information and belief, Carpenter and/or BCNY has received 70% rather than 60% of such compensation, and, therefore, Israel and Taylor have not received the 40% of all compensation to which they are entitled under the Termination Agreement.

42. Carpenter's failure to perform his obligations under Paragraph 2 of the Termination Agreement was a material breach of such Agreement.

43. As a result of such breach, Israel and Taylor have been damaged in an amount to be determined at trial.

44. Israel and Taylor are entitled to specific performance requiring Carpenter to fulfill his obligations under Paragraph 2 of the Agreement.

AS AND FOR A FIFTH CAUSE OF ACTION

45. Plaintiffs Israel and Taylor repeat, reiterate and reallege each and every allegation set forth in Paragraphs 1 through 44 herein with the same force and effect as though fully set forth at length herein.

46. At all times relevant hereto, and pursuant to a written shareholders and employment agreement, Carpenter was obligated not to compete with BCNY in the areas of insurance sales and employee benefits consulting.

47. Upon information and belief, beginning in January 1991 through September 3, 1991, Carpenter breached his fiduciary duty of loyalty and his covenant not to compete by usurping and diverting corporate opportunities in the sale of insurance to clients and potential clients including, but not limited to, Knight & Carver.

48. By reason of the foregoing, Plaintiffs have been damaged in an amount to be determined.

WHEREFORE, Plaintiffs demand the following relief:

1. Judgment against Carpenter on the First Cause of Action for money damages in an amount to be determined at trial;

2. Judgment against Carpenter on the Second Cause of Action for specific performance compelling Carpenter to

perform his obligations under Paragraph 11 of the Termination Agreement;

3. Judgment against Carpenter on the Third Cause of Action for a Declaratory Judgment that:

(a) Carpenter breached his obligations under Paragraph 11 of the Termination Agreement;

(b) Carpenter is required to execute any and all assignments and/or other documents, and to do such acts, necessary for Israel and Taylor to individually commence participation in Omega and/or National Financial and to effectuate the transfer of Israel's and Taylor's interest in Omega as reflected in Carpenter's individual record ownership of Omega Voting and Participating Stock to new stock to be issued to both Israel and Taylor, either collectively or individually, and to be equitably owned by Israel and Taylor according to their allocated interests;

(c) Israel and Taylor are entitled to own of record a portion of the Voting Stock and to receive a portion of the Voting Stock Payment to be made by New England, for the BCNY Voting Stock held of record by Carpenter, in an amount to be determined at trial;

(d) Israel and Taylor are entitled to own of record a portion of the BCNY Participating Stock held of record by Carpenter and are entitled to a portion of any distribution made thereon, in an amount to be determined at trial;

(e) Israel and Taylor are entitled to own of record a portion of the NFMG Stock held of record by Carpenter, in an amount to be determined at trial;

4. Judgment against Carpenter on the Fourth Cause of Action for money damages in an amount to be deter-

mined at trial and for specific performance compelling Carpenter to perform his obligations under Paragraph 2 of the Termination Agreement;

5. Judgment against Carpenter on the Fifth Cause of Action for money damages in an amount to be determined at trial;

6. Entry of a preliminary and permanent injunction against New England and Omega from paying out any funds to Carpenter in connection with the purchase of either the Omega Voting Stock or the Participating Stock accounts and which funds are due to Israel and Taylor as part of their individual interests in the Omega Voting Stock or the Participating Stock accounts and which were held in the record name of Carpenter.

7. Establishment of a constructive trust for the benefit of Israel and Taylor with respect to their interest in the Omega Voting Stock, the Participating Stock and the NFMG Stock.

8. For interest, costs and attorneys' fees where applicable.

9. For such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 27, 1995

Yours, etc.

FISCHER WEISINGER
CALIGUIRE & PORTER
270 Madison Avenue
New York, New York 10016
(212) 545-1921
(201) 569-5959